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SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1917.

NO. 554.

THE WESTERN UNION TELEGRAPH COMPANY,

APPELLANT,

VS.

THE BALTIMORE AND OHIO RAILROAD COMPANY.

APPEAL FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

MOTION TO ADVANCE.

Comes now J. DuPratt White, appearing on behalf of the appellee, The Baltimore and Ohio Railroad Company, complainant below, and respectfully moves the Court to advance the above entitled cause for hearing to a near day convenient to the Court.

This suit was brought in the United States District Court for the Southern District of New York,

by The Baltimore and Ohio Railroad Company against Western Union Telegraph Company on a bill in equity praying adjudication (1) that a certain contract between the parties, made October 15, 1887, is lawful and binding; (2) that the Telegraph Company be required specifically to perform the contract; and (3) that the Telegraph Company be perpetually enjoined from violating the contract.

The contract in suit provides for the use of the Railroad's right of way for the lines of the Telegraph Company and otherwise for the exchange of services between them. It is one of hundreds of similar contracts that for half a century have existed between railroad and telegraph companies.

The Western Union Telegraph Company has refused to perform a vital part of the contract, viz., the transmission of messages on the agreed terms, assigning as its ground for refusal certain of the provisions, as construed by the Interstate Commerce Commission, of "An Act to regulate Commerce", commonly known as the "Commerce Act", as amended.

On March 28, 1916, the Interstate Commerce Commission promulgated a conference ruling construing an amendment to the Commerce Act, which read:—

> "That nothing in this Act shall be construed to prevent telephone, telegraph and cable companies from entering into contracts with common carriers for the exchange of services.",

as requiring that such services must be exchanged upon the basis of the lawful rates of the railroad, as published and filed in accordance with the provisions of the Commerce Act, and of the reasonable charges of the telegraph company regularly charged other customers for similar services, except so far as such services related to "on line" transactions.

Such conference ruling requires the exchange of services between the Railroad and the Telegraph Company upon a different basis from that which obtains in said contracts.

Since the promulgation of such ruling and pending final determination of the matter by the Courts, the railroads and the Telegraph Company have kept open accounts as to their inter-relations, and until such final determination will be unable definitely to decide what obligations are mutually owing.

The United States District Court, in its opinion below, said:

> "The contract between these parties is typical of contracts between railroad companies and the Telegraph Co. throughout the United States and the importance of the question may be realized when it is stated that the telegraph lines operated and controlled by defendant comprise over 200,000 miles of poles and cables and over 1,000,000 miles of wire, that defendant has nearly 25,000 offices, about 20,000 of which are railroad offices, yielding revenues too small to pay for maintenance separate and apart from the advantage derived from contracts with the railroad companies and that a

> very large part of defendant's system is constructed in accordance with approximately 1,300 contracts with approximately 300 different railroads and railroad sytems, all such contracts being similar in their underlying provisions with that between the parties to this suit."

In both said District Court and the United States Circuit Court of Appeals, Second Circuit, the Interstate Commerce Commission filed briefs herein as *amicus curiæ*.

Said Circuit Court of Appeals, in its opinion affirming the decree herein, said:

> "The real contest in this case is between the plaintiff and defendant on one side and the Interstate Commerce Commission on the other, and the sole question presented in argument or by assignment of error is whether under the Act to regulate commerce as amended June 18, 1910, it is lawful for railway and telegraph companies to observe the terms of a contract made between them (and lawful when made), long before passage of the statute referred to."

The President of the United States in his Proclamation of December 26, 1917, assuming control of the railroads of the United States, said:

> "Until and except, so far as said director shall from time to time otherwise by general or special orders determine, such systems of transportation shall remain subject to all existing

statutes and orders of the Interstate Commerce Commission".

and further in said Proclamation said:

> "The director shall as soon as may be after having assumed such possession and control enter upon negotiations with the several companies looking to agreements for just and reasonable compensation for the possession, use and control of the respective properties on the basis of an annual guaranteed compensation, above accruing depreciation and the maintenance of their properties, equivalent, as nearly as may be, to the average of the net operating income thereof for the three year period ending June 30, 1917—the results of such negotiations to be reported to me for such action as may be appropriate and lawful."

The bill now pending before the Congress entitled "An Act to provide for the operation of transportation systems while under Federal control, for the just compensation of their owners, and for other purposes", provides for a guaranteed income to the railroads while under Federal operation on the basis of the average net railway operating income for the three years ending June 30, 1917, called in the bill "standard return", and further provides for the method of determination of such "standard return", and that all such income of the railroads in excess thereof shall be the property of the United States.

This application to advance is made by virtue of subdivision 7 of Rule 26 of Rules of the Supreme

Court of the United States, on the ground that there are special and peculiar circumstances attaching to this case, as shown above to the Court, which emphasize the importance to all the great railroad systems of the country of having as speedily as possible a final determination of the question of the legality of these contracts because of the necessity of adjusting accounts between the railroads and the telegraph companies in order to arrive at the average net railway operating income or "standard return", which is provided for under the President's Proclamation and under the pending act of the Congress in connection with the Federal operation of the railroads.

Respectfully submitted,

Counsel for Appellee.